R. RAJASINGAM

v.

BALWANT SINGH PURBA

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' V.C GEORGE JCA
DATUK MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-02-241-95]
21 MAY 1996

CIVIL PROCEDURE: *Striking out - Want of prosecution - Inordinate and inexcusable delay - Prejudice - When can application to strike out be made - Failure to give notice of intention to proceed.*

CIVIL PROCEDURE: *Affidavits - Affidavits verifying list of documents - Failure to file in time - Failure to apply for extension of time.*

CIVIL PROCEDURE: *Summons for directions - Failure to have summons heard promptly.*

This was an appeal by the appellant against the decision of the Judicial Commissioner in dismissing his application to strike out the respondent's writ of summons for want of prosecution.

The respondent had filed a writ of summons against the appellant on 17 December 1986. The appellant entered appearance on 24 December 1986, and filed his defence on 17 January 1987. On 14 January 1987, the respondent applied to cross examine the appellant. The application was refused on 13 May 1987, and the respondent appealed to the Supreme Court on the same day. On 27 March 1989, the respondent withdrew his appeal. On 19 January 1987, the respondent took out a summons in chambers to strike out certain paragraphs in the appellant's statement of defence but withdrew it on 25 May 1989. The respondent filed his summons for directions on 17 May 1989, which was heard on 9 September 1993. The respondent's affidavit verifying the list of documents was filed on 14 April 1994. Finally, on 27 April 1994, the appellant filed an application to strike out the respondent's writ of summons. This was dismissed by the Judicial Commissioner on 27 March 1995.

It was the appellant's case that: (1) the respondent failed to give notice of his intention to proceed after a lapse of more than two years after having filed his summons in chambers to strike out certain paragraphs in the appellant's statement of defence; (2) after taking out the summons for directions, the respondent did not proceed to have it heard promptly, but took another four years to have it heard; (3) after the hearing of the summons for directions, the respondent did not file his affidavit verifying the list of documents

within the prescribed 14 days, but only after more than six months; and (4) the respondent did not apply for an extension of time to file his affidavit.

Held:

Per Mokhtar Sidin JCA (delivering the judgment of the Court):

[1] No explanation was offered by the respondent on the one and a half year of delay which he took in sending the necessary documents to the Senior Assistant Registrar for the reconstruction of the Court file which was lost. This amounted to an inordinate delay on the part of the respondent and his solicitors.

[2] It is trite that the conduct of the matter was with the respondent, and that the appellant was entitled, at any stage, to apply to the Court to strike out the respondent's action for want of prosecution. The appellant's delay in applying to strike out the respondent's action for want of prosecution should not be held against him.

[3] To justify an extension of time for the filing of the record there must be material upon which the Court could exercise its discretion, otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a time table for the conduct of litigation.

[4] There was a delay of more than six years before the affidavit verifying the list of documents was filed; followed by a further delay on the respondent's part when he failed to file the necessary papers in time. These delays have the cumulative effect of being inordinate and inexcusable, and have prejudiced the appellant in terms stated by the Federal Court in the case of *Toh Hock Thye & Ors v. Toh Chwee Biow*.

[Appeal allowed.]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Pembatalan - Ketiadaan pendakwaan - Kelewatan yang melampau dan yang tidak dapat dimaafkan - Kemudaratan - Bilakah boleh permohonan untuk membatalkan dibuat - Kegagalan untuk memberi notis niat untuk meneruskan.*

***PROSEDUR SIVIL:** Afidavit-afidavit - Afidavit yang menentusahkan senarai dokumen - Kegagalan untuk memfailkan pada masa yang dihadkan - Kegagalan untuk memohon perlanjutan masa.*

***PROSEDUR SIVIL:** Saman untuk Arahan - Kegagalan untuk mendengar saman pada waktunya.*

Ini adalah satu rayuan oleh perayu terhadap keputusan Pesuruhanjaya Kehakiman dalam menolak permohonannya untuk membatalkan writ saman responden kerana ketiadaan pendakwaan.

Responden telah memfailkan satu writ saman terhadap perayu pada 17 Disember 1986. Perayu telah memasukkan kehadiran pada 24 Disember 1986, dan telah memfailkan pembelaannya pada 17 Januari 1987. Pada 14 Januari 1987, responden telah memohon untuk memeriksa-balas perayu. Permohonan tersebut telah ditolak pada 13 Mei 1987, dan responden merayu kepada Mahkamah Agung pada hari yang sama. Pada 27 Mac 1989, responden telah menarik-balik rayuannya. Pada 19 Januari 1987, responden tersebut telah telah mengeluarkan satu saman dalam kamar untuk membatalkan perenggan-perenggan yang tertentu dalam pernyataan tuntutan plaintiff tetapi telah menariknya balik pada 25 Mei 1989. Responden telah memfailkan saman untuk arahannya pada 17 Mei 1989, yang mana telah didengar pada 9 September 1993. Afidavit responden yang menentusahkan senarai dokumen-dokumen yang telah difailkan pada 14 April 1994. Akhirnya, pada 27 April 1994, perayu telah memfailkan satu permohonan untuk membatalkan writ saman responden. Permohonan ini telah ditolak oleh Pesuruhjaya Kehakiman pada 27 Mac 1995.

Ianya merupakan kes perayu bahawa: (1) responden telah gagal untuk memberikan notis mengenai niatnya untuk meneruskan tindakan selepas luput masa selama lebih daripada dua tahun setelah memfailkan saman dalam kamar untuk membatalkan perenggan-perenggan yang tertentu di dalam pernyataan pembelaan perayu; (2) selepas mengeluarkan saman untuk arahan, responden telah tidak meneruskan untuk tidak mendengarnya dengan segera tetapi sebaliknya mengambil masa selama empat tahun untuk mendengarnya;(3) selepas perbicaraan saman untuk arahan, responden telah tidak memfailkan afidavitnya untuk menentusahkan senarai dokumen-dokumen tersebut dalam tempoh yang ditetapkan selama 14 hari, tetapi telah hanya melakukannya selepas lebih daripada 6 bulan; dan (4) responden telah tidak memohon untuk satu lanjutan masa bagi memfailkan afidavitnya.

Diputuskan:

Oleh Mokhtar Sidin HMR (menyampaikan penghakiman Mahkamah):

[1] Tiada penjelasan diberikan oleh responden mengenai kelewatan selama satu setengah tahun yang telah diambil olehnya untuk mengirimkan dokumen-dokumen yang perlu kepada Penolong Kanan Pendaftar bagi penyusunan semula fail Mahkamah yang telah kehilangan. Ini telah membawa kepada satu kelewatan yang melampau di pihak responden dan peguamcara-peguamcaranya.

[2] Ianya merupakan undang-undang trite bahawa pengendalian perkara tersebut adalah terletak pada responden, dan bahawa perayu adalah berhak, dimana-mana peringkat sekali pun, untuk memohon kepada Mahkamah bagi

membatalkan tindakan responden kerana ketiadaan pendakwaan. Kelewatan perayu memohon untuk membatalkan tindakan responden kerana ketiadaan pendakwaan tidak seharusnya digunakan terhadapnya.

[3] Bagi mewajarkan satu perlanjutan masa untuk memfailkan rekod, haruslah terdapat bahan di atas mana Mahkamah boleh melaksanakan budibicaranya, jika tidak satu pihak yang bersalah berkemungkinan akan mempunyai hak mutlak kepada satu perlanjutan masa yang mana akan mematahkan tujuan kaedah-kaedah yang mana tujuannya ialah untuk memberikan satu jadual waktu bagi pengendalian litigasi.

[4] Terdapat kelewatan selama lebih daripada enam tahun sebelum afidavit yang menentusahkan senarai dokumen-dokumen tersebut difailkan; yang diikuti dengan kelewatan yang seterusnya di pihak responden bilamana beliau gagal untuk memfailkan kertas-kertas guaman yang perlu pada masanya. Kelewatan-kelewatan ini mempunyai kesan longgokan yang melampau atau tidak dapat dimaafkan, dan telah menjejaskan perayu menurut terma-terma yang dinyatakan oleh Mahkamah Persekutuan dalam kes *Toh Hock Thye & Ors. v. Toh Chwee Biow.*

[Rayuan dibenarkan.]

Cases referred to:
Birkett v. James [1977] 2 All ER 801 ***(refd)***
Ratnam v. Cumarasamy & Anor. [1965] MLJ 228 ***(foll)***
Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(foll)***

Legislation referred to:
Rules of High Court 1980, O. 3

For the appellant - R.R. Sethu; M/s. Rajasingam & Co.
For the respondent - Karpal Singh (Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.

JUDGMENT

Mokhtar Sidin JCA:

This is an appeal by the appellant against the decision of the learned Judicial Commissioner who had conditionally ordered the dismissal of the action by the respondent. We had earlier allowed the appeal and we now give our reasons for doing so.

In order to understand the appeal we set down the chronology of events. On 17 December 1986 the respondent filed a writ of summons against the appellant for damages and a declaration that the respondent is entitled to certain professional fees paid to the appellant on behalf and in trust for the respondent. On 24 December 1986 the appellant entered appearance. On 17 January 1987 the appellant filed his defence. On 14 January 1987 the respondent applied to

cross-examine the appellant. This application was dismissed on 13 May 1987. On the same date the respondent appealed to the Supreme Court against that decision. On 27 March 1989 the respondent withdrew his appeal. On 19 January 1987 the appellant took out summons-in-chambers to strike out certain paragraphs of the statement of defence but withdrew the summons-in-chambers on 25 May 1989. The summons for directions was filed on 17 May 1989 and this was heard on 9 September 1993. On 14 April 1994 the affidavit verifying documents was filed.

On 27 April 1994 the appellant filed an application to strike the respondent's writ of summons for want of prosecution. The learned Judicial Commissioner dismissed the application on 27 March 1995.

In the affidavit in support of his application, the appellant stated that the respondent had failed to give notice of intention to proceed after more than two years after filing his summons-in-chambers to strike out certain paragraphs of the appellant's defence as required by O. 3 of the Rules of the High Court. Only then did the respondent file his summons for directions. It was alleged by the appellant that even after taking out the summons for directions the respondent did not proceed to have it heard promptly. It took another four years before the summons for directions was heard and that took place on 9 September 1993. Appellant alleged that this amounted to undue delay on the part of the respondent to proceed with the action. Appellant alleged that this was one aspect of inordinate delay on the part of the respondent.

Another aspect of inordinate delay on the part of the respondent as stated by the appellant was that after the hearing of the summons for directions the respondent did not file his affidavit verifying the list of documents within the prescribed fourteen days. The respondent filed his affidavit only on 14 April 1994 some six and a half months later. The respondent did not apply for an extension of time from the Court to file his affidavit and thus he was in breach of the order for directions.

In his reply respondent stated that, as to the former delay it was not his or his solicitor's fault because the Court file relating to this matter was lost and the action could not be proceeded with further until the Court file was found. The Court file was reconstructed when the original file could not be found. When the file was reconstructed the summons for directions was proceeded on. The respondent admitted the said second aspect of delay. He purported to give as an excuse that the appellant himself had not complied with the order for directions in that the appellant did not file his list of documents and his affidavit verifying the documents within the stipulated time.

In his affidavit appellant stated that he was not aware that the Court's file was missing and he was not informed that the file was reconstructed and he was not consulted or asked to assist the Court and the respondent in the reconstruction of the file.

In his judgment the learned Judicial Commissioner found that there was delay on the part of the respondent before the reconstruction of the file. However, the learned Judicial Commissioner went on to say that the delay was explained by the respondent. The learned Judicial Commissioner found that there was a gap between 17 May 1989 to 13 November 1989. From the evidence it is clear that on 24 April 1989 the respondent withdrew his appeal to the Supreme Court. On 17 May 1989 the respondent filed his summons for directions. It is clear that until 15 June 1991 when the respondent's solicitor sent a letter requesting for the hearing of the summons for directions nothing was done to have the matter proceeded with. This was followed by several reminders, the last being 6 November 1993. Until then there was no indication that the file was missing. On 13 November 1991 the Senior Assistant Registrar wrote to the respondent's solicitor in response to the latter's letter dated 6 November 1991 informing him that the Court's file was missing and suggesting that the solicitor reconstruct the file. The reply to this letter was dated 16 July 1993 which was about one a half years later when the necessary documents for the purpose of reconstruction was submitted to the Registry. It is to be noted that all the time the appellant was never informed of this. No explanation was ever given by the respondent or his solicitor why there was a delay of one and a half years for him to send the necessary documents to the Senior Assistant Registrar for the reconstruction of the file. It is clear that the appellant was not involved at all in the reconstruction of the file. He was not asked to help in the reconstruction of the file. In our view no blame is to he attached to the appellant or his solicitor because neither of them knew what was going on. By the same letter the respondent's solicitor requested for the hearing of the summons for directions. In his judgment the learned trial Judicial Commissioner stated that the appellant gave an explanation to this delay. With the greatest respect, we are of the view that it is not an explanation at all. Even if it is, we do not think it is satisfactory and reasonable and is not acceptable. As can be seen from the record of appeal the documents involved in the reconstruction of the file has less than 40 normal pages. Particularly with there being modern technology to make copies of those documents we fail to understand why it took one and a half years to reconstruct the file. There is no suggestion that some of the documents were missing from the respondent's file. If it is so the respondent could easily get them from the appellant or his solicitor. No such request was ever made to the appellant or his solicitor suggesting the documents were available with the respondent all the time. As such we see no reason why it took such a long time for the respondent to file copies of those documents with the Registry. In our view there was inordinate delay on the part of the respondent and his solicitor. In our view no reasonable excuse had been given for the delay.

As to the second delay which is the delay in filing the affidavit verifying the documents the respondent explained that the respondent was not the only party to be blamed. The appellant was also to be blamed for not filing his affidavit.

The suggestion appeared to be that when the appellant delayed filing his affidavit, he in effect was condoning or excusing the respondent in the delay. It appears that the learned Judicial Commissioner was persuaded with this argument.

The learned judicial Commissioner expressed the view that the appellant is also to be blamed for the delay in that the appellant did not take early action to strike out the respondent's action. It is trite that the conduct of the matter was with the plaintiff/respondent and that the defendant/appellant is entitled at any stage to apply to the Court to strike out the respondent's action for want of prosecution. The delay in doing so should not be held against the appellant. It was also suggested that the appellant should take the initiative to take out the summons for directions when the respondent failed to do so. Be that as it may, it was also open to the appellant to apply to strike out the respondent's claim.

The striking out of an action for want of prosecution is stated in the case of *Birkett v. James* [1977] 2 All ER 801 at page 805 where Lord Diplock said:

> ... I shall refer to as *Allen v. McAlpine*, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to RSC O. 25, r. 1, of the current White Book. The power should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the Court or conduct amounting to an abuse of the process of the Court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party: ....

This principle had been accepted in Malaysia as cleary stated in the case of *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 where it was held that:

> (1) ... the plaintiff's action is liable to be dismissed for want of prosecution when the Court is satisfied that (a) the plaintiffs default has been intentional and contumelious or (b) the plaintiff or his lawyer is guilty of such inordinate and inexcusable delay that the defendant has been prejudiced by it;

It is clear that the onus is on the respondent to justify the delay when the delay has been proved. The relevant principle is stated in the case of *Ratnam v. Cumarasamy & Anor.* [1965] MLJ 228 where the Privy Council held that to justify an extension of time for the filing of the record there must be material upon which the Court could exercise its discretion, otherwise a party in breach

would have an unqualified right to an extension of time which would defeat the purpose of the rules which was to provide a time table for the conduct of litigation.

In the case of *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 the Federal Court held that the appellants having kept the suit in abeyance for five years and three months during which they remained completely inactive and having given no answer nor satisfactory explanation at all to this inactivity when called upon to do so by the Court, were guilty of inordinate and extensible delay if not also of intentional and contemptuous conduct which entitled the Court to dismiss their action for want of prosecution. At page 154 Salleh Abas FJ (as he was then) said:

> ... The delay of five years and three months in our view is by no means short. It is long enough to enable a baby to grow into a big child with ability to talk intelligently and be in a kindergarten preparatory to normal schooling. In our view such delay apart from being inordinate and inexcusable has also resulted in adverse effects on the respondent. The prejudice to him here is, not merely confined to the possibilities of not having a fair trial or in the form of failing memory of the witnesses or lack of documents and non-availability of witnesses but also encompassing the psychological effect which the suit had on him for having it hung over his head for the last five years or so, (see *Biss v. Lambeth*). If we take into account the totality of the period from the commencement of the cause of action on 2 October 1951, the time span of this suit would be 28 years 10 months and 24 days. Such a lengthy period is surely too long, extending as it were more than a quarter of a century.

In the present case there is a delay of more than six years before the affidavit verifying documents was filed followed by the further delay by the respondent when the respondent failed to file the necessary papers in time. Those delays have the cummulative effect of inordinate and inexcusable delay which has the effect that the defendant/appellant had been prejudiced in the terms stated by the case of *Toh Hock Thye & Ors. v. Toh Chwee Biow (supra)*. The point was made when the appellant in his affidavit stated that he is unable to trace his witnesses. This becomes more significant when the action depends on witnesses and not on documents.

It is clear to us that the respondent was in breach of the rules and in our judgment the appellant is entitled to have the respondent's action struck out. The appeal was accordingly allowed with costs and the deposit refunded to the appellant.

[Editor's Note: Respondent's application for leave to appeal to the Federal Court *vide* Civil Application No. 08-76-95 has been granted].

Reported by Gan Peng Chiang